No. 10,127

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE WASHINGTON WATER POWER COMPANY, a corporation, THE CITY BANK FARMERS TRUST COMPANY, a corporation, and RALPH E. MORTON, as Trustee,

vs. *Appellants,*

UNITED STATES OF AMERICA, *Appellee.*

And

UNITED STATES OF AMERICA, *Appellant,*

vs.

THE WASHINGTON WATER POWER COMPANY, a corporation, THE CITY BANK FARMERS TRUST COMPANY, a corporation, and RALPH E. MORTON, as Trustee, *Appellees.*

Upon appeal and cross-appeal from the District Court of the United States for the Eastern District of Washington.

ANSWER BRIEF OF FERRY COUNTY, WASHINGTON and STEVENS COUNTY, WASHINGTON, to cross-appeal of UNITED STATES OF AMERICA.

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STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS FOR JURISDICTION

The United States of America instituted suit to condemn uplands of Ferry and Stevens County, Washington, belonging to appellee, the Washington Water Power Company. A petition for condemnation was served upon the appellants and upon appellees, Stevens County, Washington, and Ferry County, Washington, among others, and filed with the clerk of the United States District Court for the Eastern District of Washington Northern Division. This petition for condemnation is set forth on Pages 2 to 20 of the Transcript of the Record. The statutory provision which sustains the jurisdiction of the District Court is Section 257, Title 40, U. S. C. (August 1, 1888, c. 728, Sec. 1, 25 Stat. 357).

The statutory provision which sustains the jurisdiction of the Circuit Court of Appeals for the Ninth Circuit is Section 225, Title 28 U. S. C. (March 3, 1891, c. 517, Sec. 6, 26 Stat. 828; March 3, 1911, c. 231, Sec. 128, 36 Stat. 1133; January 28, 1915, c. 22, Sec. 2, 38 Stat. 803; February 7, 1925, c. 150, 43 Stat. 813; February 13, 1925, c. 229, Sec. 1, 43 Stat. 936) and Section 230, Title 28 U. S. C. (March 3, 1891, c. 517, Sec. 11, 26 Stat. 829; February 13, 1925, c. 229, Sec. 8 (c), 43 Stat. 940) together with Rules of Civil Procedure, Rule 73 and Rule 81 (a) (7).

Possession of and title to the said uplands was obtained by the United States Government by a judgment of taking (T. of R. p. 33) entered upon a dec-

laration of taking (T. of R. p. 20). Final judgment was entered by the District Court on the 14th day of March, 1942 (T. of R. p. 294). Notice of appeal and bond were filed by appellant March 30, 1942 (T. of R. p. 307).

Notice of cross-appeal was filed by the United States of America May 15, 1942 (T. of R. p. 319-320).

SUMMARY OF ARGUMENT

The Government took possession of and title to the property involved on December 9, 1939. Taxes for 1939 had been levied on the land prior to this date. The law of the State of Washington provides that taxes assessed upon real property shall be a lien thereon from and including the first day of January in the year in which they are levied until the same are paid, but as between a grantor and a grantee such lien shall not attach until the fifteenth day of February of the succeeding year. This latter provision fixes the respective rights of the grantor and grantee and protects the grantor on his warranty as against a suit for unpaid taxes.

The Supreme Court of the United States has held that the Federal Constitution does not prohibit states from fixing the time when a tax lien attaches to real property.

Stevens and Ferry Counties were brought into this action as parties defendant for the purpose of having their respective interests in the land adjudicated and a just compensation paid therefor.

ARGUMENT

The following are the material parts of Remington's Revised Statutes of Washington pertinent to this appeal:

Section 11238: "For the purpose of raising revenue for state, county and other taxing district pur-

poses, the board of County Commissioners of each county at its October session, and all other officials or boards authorized by law to levy taxes for taxing district purposes, shall levy taxes on all the taxable property in the county or district, as the case may be, sufficient for such purposes;—."

Section 11239: "It shall be the duty of the board of county commissioners of each county, on or before the second Monday in October in each year, to certify to the county assessor of the county the amount of taxes levied upon the property in the county for county purposes, and the repsective (respective) amounts of taxes levied by the board for each taxing district, within or coextensive with the county, for district purposes, and it shall be the duty of city councils of cities of the first class having a population of three hundred thousand or more, and of city councils of cities of the fourth class, or towns, and of all officials or boards of taxing districts within or coextensive with the county, authorized by law to levy directly and not through the board of county commissioners, on or before the second Monday in October in each year, to certify to the county assessor of the county the amount of taxes levied upon the property within the city or district for city or district purposes."

Section 11240: "The county assessor shall deliver said tax-rolls to the county auditor on or before the fifteenth day of December, taking his receipt therefor."

Section 11243: (As amended by c. 30, p. 68, sec. 1, Session Laws of 1935). "On the first Monday in

January next succeeding the date of levy of taxes the county auditor shall deliver to the county treasurer the tax rolls of his county for such assessment year, with his warrant thereto attached, authorizing the collection of said taxes, taking his receipt therefor, and said books shall be preserved as a public record in the office of the county treasurer. The amount of said taxes levied and extended upon said rolls shall be charged to the treasurer in an account to be designated as treasurer's 'Tax Roll Account' for..... and said rolls with the warrants for collection shall be full and sufficient authority for the county treasurer to receive and collect all taxes therein levied: Provided, That the county treasurer shall in no case collect such taxes or issue receipts for the same or enter payment or satisfaction of such taxes upon said assessment rolls before the fifteenth day of February following."

Section 11265: (As amended by c. 206, sec. 45, p. 766, Session Laws of 1939). "The taxes assessed upon real property shall be a lien thereon from and including the first day of January, in the year in which they are levied until the same are paid, but as between a grantor and a grantee such lien shall not attach until the fifteenth day of February of the succeeding year. . . . "

The taxes on the land taken were levied on October 1939. The United States acquired title to the land on December 9, 1939, and at that time it was unlawful for the County Treasurers of Ferry and Stevens Counties to collect the taxes which had been levied in

1939, or to issue receipts for the same, or to enter payment or satisfaction thereof upon the assessment rolls. The money that must be paid by the United States for lands taken as authorized by U. S. C. Title 40, sec. 258A is just compensation at the time of taking, and not just compensation at some future date when as between grantor and grantee the State, County or other third party may acquire a lien against the property after it has been acquired by the United States.

In *People's Gas and Water Co. v. City of Vancouver,* 106 F. (2d) 909, this Court stated:

> "With respect to real property, the owner of the title thereto at the time the lien attaches is liable for the taxes. *State v. Snohomish County,* 71 Wash. 320, 128 P. 667; *Bethany Presbyterian Church v. City of Seattle,* 154 Wash. 529, 282 P. 922; *State ex rel. Oregon-Washington Water Service Co. v. City of Hoquiam,* 155 Wash. 678, 286 P. 286, 287, 670."

The two cases last cited in the above quotation from this Court's decision involved constructions by the Supreme Court of Washington of the following portion of a statute:

> "The taxes assessed upon real property shall be a lien thereon from and including the first day of March in the year in which they are levied until the same are paid, but as between a grantor and a grantee such lien shall not attach until the first Monday in February of the succeeding year. . . . " (Rem. 1927 Sup. Sec. 11097-104).

It is conceded on page 21 of Cross-Appellant's Brief that under section 11265, Remington's Revised Statutes

of Washington as construed in the case of *Bethany Presbyterian Church v. City of Seattle,* 154 Wash. 529, 282 P. 922, that a condemnor is a grantee. The same statute providing that as between the grantor and grantee the tax lien does not become effective until February 15th of the following year does no more than to determine the rights and liabilities of the respective parties as to payment of the tax which at all times during the year has been a lien on the land and protects the grantor from a suit on his warranty for unpaid taxes. The lien attached to the land on January 1, 1939, and it remained a lien at all times until paid, not collectible it is true, from either grantor, grantee or from any other person, as the laws of the State of Washington (Rem. Rev. Stat. of Wash. Sec. 11243) forbids payment to, or the collection of taxes by the county treasurer prior to February 15 of the year following assessment and levy. The taxes were actually levied two months before the United States became the owner of the land.

Of this lien all parties dealing with the land were bound to take notice in the same manner and to the same extent as of any other lien or incumbrance of record. If the construction of the statute by Cross-Appellant is a correct one then the lien imposed for taxes on real property from the first day of January in the year in which they are levied until the same are paid would be extinguished by a sale of the land at any time during the year, to be revived on the 15th day of February following. Such a construction is wholly at variance with the plain provisions of the

statute. The lien is upon the land and remains as a valid and existing charge against the land of the amount of the taxes levied until they are paid. (Rem. Rev. Stat. 11265). The owner of the land on the 15th day of February of the year following (the tax paying date) is charged with their payment.

In the case of the *United States v. Alabama,* 313 U. S. 274, the tax law of Alabama provides that at the time when property becomes assessable the state has a lien upon any property owned by a taxpayer for the payment of the taxes assessed against him, which lien continues until such taxes are paid. The United States acquired the property within the tax year but after the lien had attached. Under the statute a subsequent purchaser took with notice of the existence of the lien. The Court held that the United States in acquiring the property was in the same position as any other purchaser. In the State of Washington, the tax lien attaches on the first day of January of the tax year, and the taxes involved in the instant case having been levied in October, 1939, and the United States not having acquired the property until December 9th of the same year, it took with notice under the rule laid down in the Alabama case.

This is not a tax levied nor a lien attached after the United States became the owner of the property as Cross-Appellant seems to contend. As has been pointed out, the lien attached on the first day of the tax year and the tax was actually levied prior to the time the United States became the owner on December

9, 1939. Any grantee would be bound to take notice of the existence of the lien for under the plain provisions of the statute the grantor would be released from its obligation. Payment of the tax thereafter by the grantee would not be the payment of a part of a just compensation for the land taken, but a duty and obligation placed upon him by statute if he remained the owner on February 15 following. In support of this contention, we call the attention of the Court to the case of *Magruder v. Supplee,* decided by the Supreme Court of the United States on May 25, 1942, and reported in Vol. 86 Law Edition Advance Opinions No. 15, p. 1025, wherein the Court speaking with reference to the deduction of taxes by an income taxpayer says:

> "Resort must be had here to the laws of Maryland and of the City of Baltimore to determine upon whom the state and city real estate taxes were imposed. *Walsh-McGuire Co. v. Commissioner of Internal Revenue* (CCA 6th) 97 F (2d) 983, 984; cf. *Helvering v. Fuller,* 310 U. S. 69, 74, 75, 84 L. ed. 1082, 1084, 1085, 60 S. Ct. 784; and see Paul, op. cit., supra, pp. 23, 24.
>
> "To illustrate concretely the workings of the Maryland tax system with respect to respondents' purchases the property bought on May 10, 1936, may be taken as typical of all the other transactions. The assessment date, or 'date of finality,' for both state and city taxes was October 1, 1935. These taxes were for the calendar year 1936 and became due and payable on January 1, 1936, although the default date for city taxes was not until July 1, 1936, and for state taxes January 1, 1937. Both the state and the city had liens against the property from the due date, January 1, 1936. And, respondents' vendor became per-

sonally liable for these taxes before the sale. An action of assumpsit could have been brought against him for the taxes at any time after the due date. Had he sold the property between October 1, 1935, and January 1, 1936, he apparently would still have remained personally liable, and if he had gone into bankruptcy after such sale the taxing authorities would have had a provable claim against him. Re Wells (DC) 4 F. Supp. 329, 23 Am. Bankr Rep. (NS) 615; cf. *Baltimore v. Perrin,* 178 Md. 101, 107, 12 A (2d) 261.

"It is thus apparent that tax liens had attached against the properties and that respondents' predecessors in title had become personally liable for the taxes prior to any of the purchases. The attachment of a lien for taxes against property before its sale has been held to prohibit the vendee from deducting as 'taxes paid,' amounts paid by him to discharge this liability. *Lifson v. Commissioner of Internal Revenue* (CCA 8th) 98 F. (2d) 508; *Walsh-McGuire Co. v. Commissioner of Internal Revenue* (CCA 6th) 97 F. (2d) 983; *Merchants Bank Bldg. Co. v. Helvering* (CCA 8th) 84 F. (2d) 478; *Helvering v. Missouri State L. Ins. Co.* (CCA 8th) 78 F. (2d) 778, 781. A tax lien is an encumbrance upon the land, and payment, subsequent to purchase, to discharge a pre-existing lien is no more the payment of a tax in any proper sense of the word than is a payment to discharge any other encumbrance, for instance a mortgage. It is true that respondents here could not have retained the properties unless the taxes were paid, but it is also true that they could not retain them without paying the purchase price. It is no answer therefore to say that the property was burdened with the taxes and that respondents became obligated to pay them. There was a burden, but it was contractually assumed. In discharging this assumed obligation respondents were not paying taxes imposed upon them within the meaning of Sec. 23 (c). For 'only the

person owning the property at that time (i. e., when the tax lien attaches) is subjected to the burden which the law imposes; and only the person who has been thus subjected to the burden of the tax is entitled to a deduction for paying it. Payment by a subsequent purchaser is not the discharge of a burden which the law has placed upon him, but is actually as well as theoretically a payment of purchase price; for, after the lien attaches and the taxing authority becomes pro tanto an owner of an interest in the property, payment of the tax by a purchaser is nothing but a part of the payment for unencumbered title.' Judge Parker, dissenting in *Commissioner of Internal Revenue v. Rust* (CCA 2d) 116 F. (2d) 636, 641."

Applying this reasoning to the case at bar, if The Washington Water Power Company had negotiated a sale to the United States on December 9, 1939, it could not have paid the taxes and deducted them on its income tax as taxes paid, because they were not taxes it was obligated to pay. The Company would have been entitled to the market price without consideration for the 1939 taxes, and the Government, like any other purchaser who desired an unencumbered title, would have to pay the taxes, since they were then a lien on the land.

That there is nothing contained within the United States Constitution which prohibits any state from fixing the time and conditions under which a lien for taxes should attach to real property is expressly held in the case of *United States vs. Alabama* ante wherein the Court speaks as follows:

"There is no question, however, as the Govern-

ment concedes, that the state statute purports to impose a lien as of October 1, 1936, for the taxes which by the process of assessment were to become payable for the tax year 1937. October first is fixed as the tax day, and as of that day owners are to make their returns, values are to be fixed and the taxes paid. There is no question that the State thus undertakes to create an inchoate lien upon the lands as of the tax day, a lien which is to be effective for the amount of the taxes for the ensuing year as these are fixed by the defined statutory method. This lien by the state law is made effective not only as against the owners on the tax day but also as against subsequent mortgagees and purchasers. 'It follows the lands in the hands of the vendee, all persons being chargeable with a knowledge of its existence.' *Driggers v. Cassady,* 71 Ala. 529, 534. See, also *Swann v. State,* 77 Ala., 545; *State v. Alabama Educational Foundation,* 231 Ala. 11, 16, 163 So. 527. We find nothing in the Federal Constitution which invalidates such a statutory scheme. Subsequent lienors and purchasers have due notice of the tax liability imposed as of the tax day and of the process of assessment, and that liability, when its amount is definitely ascertained, relates back to the day specified. We recognized the validity of such a provision in *New York v. Maclay,* 288 U. S. 290, 292, 53 S. Ct. 323, 324, 77 L. Ed. 754, where we observed that a tax lien created in a similar manner under a statute of New York 'is effective for many purposes, though its amount is undetermined. It is notice to mortgagees or purchasers, who are held to loan or purchase at their own risk if they take their mortgages or deeds before the tax has been assessed or paid.' The precise decision in that case allowing priority to the United States under R. S. Sec. 3466, 31 U. S. C. A. Sec. 191, for debts due by an insolvent corporation over claims of the State for franchise taxes due but not assessed or liquidated until after a receivership, in no way detracted from the recog-

> nition of the effectiveness of the state law creating a lien as against mortgagees and purchasers. As the court said, 'Against mortgagees and purchasers a lien perfected afterwards may take effect by relation as of the date of the inchoate lien through which mortgagees and purchasers become chargeable with notice.' 288 U. S. page 293, 53 S. Ct. 324, 77 L. Ed. 754. See also, *Osterberg v. Union Trust Co.*, 93 U. S. 424, 425, 428, 23 L. Ed. 964; *People v. Commissioners*, 104 U. S. 466, 568, 26 L. Ed. 632. Compare *Shotwell v. Moore,* 129 U. S. 590, 598, 9 S. Ct. 362, 364, 32 L. Ed. 827. The lien in such a case, though inchoate on the date specified and maturing when the extent of liability is ascertained by the statutory process, is similar in that respect, as the court said in the Maclay case, to the lien of a transfer tax or duty upon the estate of a decedent which is effective although the amount is ascertained after death."

This is not an action brought by Appellees Ferry County and Stevens County, Washington, against the United States for the recovery of taxes, but an action brought by the United States against the Washington Water Power Company and other defendants, including the above named counties, and the petition alleges that "Ferry County, Washington; Stevens County, Washington, . . . having or claiming to have any right, title, estate, lien or interest in or to the land described above as Tract 1, or any part thereof, claims some interest therein, the exact nature and amount whereof is unknown to petitioner." (T. of R., p. 17-18). And in the prayer of said petition pray that "Court proceed to determine the interest of the defendants herein." (T. of R. p. 19). Appellees Ferry County and Stevens County, Washington, appeared and by evidence (T. of R. 66-85) established the

amount of their lien for taxes and judgment was entered in their favor as follows: "The defendant Stevens County, Washington, in the sum of One Thousand Nine Hundred Seventy Dollars and Seventy-six Cents ($1,970.76) with interest on said sum at the rate of 6% per annum from December 9, 1939, until paid, and in favor of the Defendant Ferry County, Washington, and against the United States of America in the sum of One Thousand Thirty-three Dollars and Twenty Cents ($1,033.20) with interest at the rate of 6% per annum from December 9, 1939, until paid." (T. of R. p. 303-304).

Under the laws of the State of Washington, and of the United States of America, pertaining to Eminent Domain Procedure, all defendants are required to establish any claim, title, or interest they may have in or to the property in controversy in order that the Court may determine to whom compensation shall be paid and the amount thereof, and these defendants and appellees were made parties defendant by the United States of America for that purpose and for said reason as a matter of law and equity are proper parties to said action and the Court has jurisdiction to settle any and all controversies that might be raised by and between all the parties to said action and the rule that the United States cannot be sued except with its permission and consent, or through the Court of Claims, has been waived by the United States in this action, and the Court has the jurisdicton and authorty in this action to enter a judgment in favor of these appellees.

This question was determined by the Supreme Court of the United States in *Luckenback S. S. Co. vs. Norwegian Barque Thekla,* 266 U. S. 328 L. ed. 313, 45 S. Ct. 112. "When the United States comes into Court to assert a claim, it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter." Citing Western Maid (*United States v. Thompson,* 257 U. S. 419, 66 L. ed 299). The Siren—7 Wall, 152, 19 L. ed. 129.

The Court also stated in the Luckenback case cited above as follows:

> "And it is reasonable for the Court to proceed to the determination of all questions legitimately involved even when it results in judgment for damages against the United States." Citing Nuestra Senora de Regla, 108 U. S. 92, 27 L. ed. 662. The Paquete Habana (*U. S. vs. Paquete Habana,* 189 U. S. 453, 47 L. ed. 901).

There is no dispute as to the amount of the lien at the time of the declaration of the taking on December 9, 1939, nor that the levy and assessment had been made on the 2nd Monday of October, 1939, prior to the taking of said property by the United States of America, or that a lien for taxes existed from and after January 1, 1939. The only dispute in this case so far as we are able to ascertain is not as to the legality or amount of the lien, but is as to the correctness of the court's construction of the Washington Statute, Section 11265, Washington Revised Statutes annotated, (Remington 1932 as amended by laws 1935, C. 30 sec. 7 as amended by laws of 1939 c. 206, sec.

45, p. 766) as to the time of the attachment of lien between grantor and grantee. The validity of tax liens created by state laws was recognized upon property acquired by the United States of America and the constitutionality of state laws creating them, affirmed by the Supreme Court of the United States in the case of *United States vs. Alabama,* 313 U. S. 274. The above case differs from the case at bar in this, it was prosecuted by the United States of America with the object and for the purpose of quieting title to lands purchased by the United States after the lien created by state laws had attached. The court denied the prayer of the petition of the United States. It is a well settled rule of law that at the time of transfer or conveyance of title to the lands involved in the case at Bar was on December 9, 1939, was equivalent and analogous to the issuance of a deed as between parties. That is the date the government became the owner of the lands in question. Subject, of course, that the interest of various parties be ascertained, the amount of just compensation "to be paid therefore" which has been done in this particular case so far as the appellee counties are concerned.

We admit there would be no question as to the validity or enforcement of the tax lien by the respective counties if United States had sold the property, in controversy in this action, to an individual between December 9, 1939, and February 14, 1940, inclusive; the purchaser from the United States would have to pay the tax lien, or the property in due course would be sold for the non-payment of the particular tax

items in controversy herein. Taking also this position, if the United States had sold this property to some individual on February 15, 1940, or at any subsequent date in order to give that individual title in fee simple to the premises, it would be necessary for the United States as vendor to pay the tax lien involved in this action; and under the decision in *United States v. Alabama,* cited above, if the United States failed to pay the tax that the respective counties could then foreclose under the state law and obtain this land from the vendee of the United States as the tax lien had never been paid, therefore, was not extinguished.

CONCLUSION

We respectfully urge that that part of the judgment awarding to Ferry County, Washington, and Stevens County, Washington, the respective sums set out therein, should be affirmed on the government's appeal.

Respectfully submitted,

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to file and have considered the attached memorandum in opposition.

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